No. 10- (1)

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

Stephen A. Marino,

Petitioner,

v.

Solicitor General of the United States,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Stephen A. Marino

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(314) 353-1925

QUESTIONS PRESENTED

In opening, I am asking the Supreme Court to please keep in mind two very important issues;

That I am at a severe disadvantage by being a "pro se" litigant and will present my case to the best of my ability and;

That I understand this case is about overturning a decision involving administrative law. For any court to overturn an administrative court decision requires an ***extreme reason.*** In my case, I am claiming **Manifest Injustice.**

Q1. Whether the Court of Appeals committed an error when it simply reaffirmed a superficial judicial review at the district court level?

Q2. Whether the Court of Appeals committed an error by allowing Social Security Administration's administrative court system to use "fraud" as a pretext to achieve their goal of expelling a qualified individual from retaining his benefits under the SSDI program since there is no legal way the respondents have to expel someone for ***misconduct.***

Q3. Regarding prior misconduct, after an individual has satisfied all requirements mandated by the criminal justice system, including incarceration and probation, can SSA impose "perpetual" punishment

on an individual who is truly qualified for their governmental program solely to inflict "additional" punitive measures in direct violation of my 9th Amendment right to be free from "the tyranny of the federal government".

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Eighth Circuit:

Stephen A. Marino,

Plaintiff-appellant;

and

Michael J. Astrue,

Commissioner of Social Security,

Defendant-Appellee

Plaintiff is a "pro se" individual not a corporation.

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This writ should be granted because there exists NO CASE LAW that requires Social Security's administrative law system to consider a person's medical records or medical history should SSA, *in it's sole discretion,* decide not to use a person's records or history regarding a case of misconduct.

U.S. Magistrate Audrey G. Fleissig made this point clear in her opinion dated Sept. 29, 2009. She was restricted to using only the evidence presented to her by the Social Security Administration. Her inability to consider my 20+ years of medical records or medical history left her with no option but to

agree with SSA's opinion that my case was "fraud".

Likewise, the 8th Circuit Court of Appeals affirmed Judge Fleissig's decision.

This Writ of Certiorari is my ONLY solution to bring my extensive medical records as well as my medical history back into evidence when considering my eligibility for the Social Security Disability Insurance Benefits that were wrongfully taken from me in Dec. 2004.

I pray that this Court will order reinstatement of my benefits, including all back benefits, and do what the lower Courts were not willing or able to do.

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IN THE

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PETITION FOR A WRIT OF CERTIORARI

Stephen A. Marino, a pro se litigant, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment in favor of the defendant (App., *infra*, 1a) is reported at 590 F.3d 607, 610. The order of the

Court of Appeals denying rehearing (App., *infra*, 6a) is unreported. The District Court's opinion denying petitioners' motion for reinstatement of Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) and granting respondent's motion to deny petitioners' disability benefits is unreported. (App., *infra*, 7a (2009) and 38a (2007)).

JURISDICTION

The judgment of the Court of Appeals was entered on April 30, 2010. (App., *infra*, 1a.) A petition for rehearing was denied on June 08, 2010. (App., *infra*, 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 405(g) provides Judicial review;

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his

principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at

any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

STATEMENT OF THE CASE

In opening, first let me say that I applied and was approved for Social Security Disability from Dec

1991 – Dec 1993 and again from Feb 1999 – Dec 2004 diagnosed with major depression, anxiety and work-related stress. I returned to work in Jan 1994 before falling ill again in 1999. My SSDI benefits were unjustly taken away from me in Dec 2004. Below is a brief synopsis of Social Security's and the Government's case against me.

The Eighth Circuit Court of Appeals ruled 3-0 with Chief Judge Riley and Judges Bye & Shepherd reaffirming Magistrate Judge Fleissig's opinion upholding the Commissioner of Social Security's position that my Social Security case is a fraud beginning with my 1999 application. Judge Fleissig gave three reasons why she agreed with Social Security's position. Her opinion was delivered as a result of a "judicial review" that I initiated through a pro se lawsuit in Federal court. For the record, please let it be known that;

1) On June 27, 2005 I pled guilty to Honorable Judge E. Richard Webber in St. Louis, MO to selling part of my prescription medication Anadrol, an anabolic steroid.
2) In 2004, agents from the Social Security Administration observed me traveling to and from the gym. The significance, according to Judge Fleissig, was that I stated on my 1999 application for benefits that I couldn't drive much.

3) According to Judge Fleissig, the most damaging evidence against me was a "supposed" confession to a "confidential informant" in which I admitted 'defrauding' the Social Security Administration out of disability benefits.

The Judicial Review took the three points above and multiplied them against a "general inference" with Judge Fleissig coming to the conclusion that my total SSDI claim, beginning in Feb 1999, was fraud. No consideration was given to the FOUR times I was hospitalized in mental institutions. Furthermore, I have had at least SIX MEDICAL PROFESSIONALS diagnose me with a GAF (Global Assessment of Functioning) of between 40 and 50 since 1991, with two psychiatrists reporting a 'chronic' GAF of 48 and 50.

Their records indicate that I've always been mentally disabled according to the law yet the Social Security Administration flatly refuses to accept ANYONE'S opinion in their quest to expel me from a program for which I truly qualify. Also, for the record, after being on SSDI 1991-1993 I got off of disability to go back to work in 1994 thru early1999. Unfortunately, I failed miserably and most disappointing to me was the fact that I again tried to resume my career managing Section 8 housing projects but could not handle the day to day stressors of the job.

REASONS FOR GRANTING THE WRIT

The reason I am appealing my case to the U.S. Supreme Court is because I need my Social Security Disability Benefits reinstated from Feb 1999 through present as I believe that they never should have been stopped based on MANIFEST INJUSTICE.

In 1999 I began receiving Social Security Disability Benefits for major depression, anxiety and work-related stress. For 23 years I had managed many large subsidized housing projects and faced numerous high-level stress situations, countless dangerous situations and, on one occasion, I saved the life of my security guard from being beaten to death by a car load of gangbangers. I also suffer from PTSD (Post Traumatic Stress Syndrome) as diagnosed by Dr. Reuben Schnayer in 2008. (App., *infra*, 65a). Also, I received SSDI 1991-1993 for a mental breakdown that caused me to be hospitalized twice in 1991. The reason I mention this is that SSA accuses me of fraud from 1999-2004 but there are no accusations of fraud when I was hospitalized TWICE in 1991 and on SSDI until the end of 1993 when I tried again to work. This is the crux of my argument against the Social Security Administration which is stated below.

In Dec 2004 I had my Social Security Disability Benefits revoked because I sold some of my prescription medicine. I pled guilty in Federal

Court on June 27, 2005. Based on this one and only conviction, SSA concluded that my mental health must be fine and that they considered it "Substantial Gainful Employment." SSA's opinion is that my disability is not relevant to me being able to perform SGA (Substantial Gainful Activity). This is where I differ with their opinion.

SSA is using the court ruling *Corrao v. Shalala*, 20 F.3d 954 (9th Cir 1994), as a pretext to punish me for *misconduct* (selling part of my prescription medication) while collecting Social Security Disability Benefits. My lengthy medical history and medical records are my documentation for Manifest Injustice. At this time I would like to point out to this Court that there is NO LAW that expels legally disabled people from the SSDI program for "misconduct".

In *Plyer v. Doe*, 457 U.S. 202 (1982), the court has ruled that there is no federal policy of exclusion for undocumented alien children from public schools. Using this case as legal precedent, the federal government does not have the right to expel a legally disabled person from SSDI.

Legal Precedent for Court Action Favoring my Case.

In my introduction, I quoted *Plyer v. Doe*, (1982), which is a derivative of *Regents of University*

of California v. Bakke, 438 U.S. 265 (1978). In the Bakke case, Allan Bakke was secretly excluded from a disadvantaged financial scholarship program because he was not a member of a disadvantaged class listed in the Civil Rights Act of 1964. His exclusion was done in a pre-textual way because the University was not up front with Mr. Bakke when he applied for this government program. He was qualified yet the University denied his admission. The California Supreme Court applied an ***undefined principle of basic fairness*** to his case and ordered Mr. Bakke's admission to the Davis Medical School with scholarship. The U.S. Supreme Court reaffirmed this **common law ruling** using 'fictio jurist', claiming it was derived from the 14th Amendment. (For the purpose of clarity, I will define any common law principle as a 9th amendment right under the Bill of Rights).

My 9th Amendment right was violated when the Administrative Law Judge (ALJ) from the Social Security Administration ***misapplied*** the law by saying that my disability was NOT relevant to my ability to perform Substantial Gainful Activity. This, in effect, nullifies my 20 year medical history and medical records. By allowing SSA to misapply the law in order to achieve their own self-serving agenda, you are giving SSA the power to make common law. It should be Congress, not the Social Security Administration, who makes the law. If

Congress wanted people who meet the *legal definition* of being disabled expelled from the SSDI program for misconduct then Congress should spell it out in the law.

SSDI and SSI as a PROPERTY RIGHT

First let me restate my position that the Social Security Administration calls my disability case fraud as a pretext because they do not have the statutory authority from Congress to legally take my disability benefits away for misconduct. (In my case, pleading guilty to selling part of my prescription medication)

In the U.S. Supreme Court case *Board of State College v. Roth* 408 U.S. 564 (1972), Justice William Brennan states that "welfare benefits and government benefits are property rights of the recipients." Justice Brennan further states that a person has 'due process' rights protecting their benefits in proportion to how much of a personal investment they have in their benefits. Because the Social Security Administration is more or less forced to hold their position accusing me of fraud, they are unable to consider further medical evidence or ANY medical evidence for that matter.

In FEB 2005 I applied for SSI only because I was informed by the Social Security Administration that I did not qualify for SSDI because I no longer

had the 40 quarters required to receive SSDI. Their position is that I can't prove that I "cannot and did not perform Substantial Gainful Activity and never will prove it in the immediate future". This language was taken out of context from *Barnhart v. Thomas* 540 U.S. 20 (2003) for the purpose of having me "prove a negative." Proving a negative is a cliché for telling someone to prove the impossible. It simply can't be done. This was SSA's answer to Judge Fleissig regarding my 2005 application for SSI when it came to Step 5 of the process. SSA is flatly refusing to finish processing my application.

(Please note that the medical report that SSA deemed "absurd" was a medical report written by my psychiatrist, Dr. Dowell, stating that my medical condition is a chronic GAF score of 50.) SSA simply refuses to accept any medical evidence from any medical professional which is truly astounding to me. Furthermore, Justice Brennan's majority opinion in the *Board of State College v. Roth* (1972) makes the case involving education also applicable to health and welfare benefits.

CONCLUSION

The point that I am making to this Court is that SSA has misapplied the law to achieve their goal of expelling me from the SSDI program (or any Social Security program for that matter). Despite volumes of medical evidence from psychiatrists,

psychologists, (App., *infra*, 76a), together with my stays in 4 psychiatric facilities, (including the 2005 order from the Bureau of Prisons that I report to the psychiatric wing of the Medical Center for Federal Prisoners in Springfield for a 30 day evaluation), as well as Judge Webber's report that I am "unemployable due to serious health conditions" (App., *infra*, 66a), along with the latest psychiatric report from REUBEN L. SCHNAYER, PH.D., C. PSYCH (2008) (App., *infra*, 67a), the Social Security Administration makes it impossible to EVER receive an objective analysis or consideration of my medical records or medical history. Therefore, I have no alternative but to ask this Court for Justice.

Based on case law stated throughout, the petition for writ of certiorari should be granted.

Respectfully submitted,

Stephen A. Marino
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St. Louis, MO 63116
(314) 353 1925
Filing pro se.

July 29, 2010

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 09-3408

Stephen A. Marino,

Appellant,

v.

Michael J. Astrue,

Commissioner of Social Security,

Appellee.

****

Appeal from the United States

District Court for the Eastern

District of Missouri.

[UNPUBLISHED]

Submitted: April 7, 2010

Filed: April 30, 2010

Before RILEY, Chief Judge, BYE, and SHEPHERD, Circuit Judges.

PER CURIAM.

Stephen A. Marino appeals following the district court's[1] order affirming the denial of disability insurance benefits (DIB) and supplemental security income (SSI) for the period from February 1999 to August 2004 (arising from a 1999 application); and reversing and remanding for further consideration of his 2005 SSI application.

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[1]The Honorable Audrey G. Fleissig, United States Magistrate Judge for the Eastern District of Missouri, to whom the case was referred for final disposition by consent of the parties pursuant to 28 U.S.C. § 636(c).

To the extent Marino has properly raised any issues for review concerning his entitlement to DIB and SSI from February 1999 to August 2004, see Meyers v. Starke, 420 F.3d 738, 743 (8th Cir. 2005) (failure to present issues with some specificity can result in waiver), we agree with the district court that the ALJ's opinion is supported by substantial evidence on the record as a whole, see McNamara v. Astrue, 590 F.3d 607, 610 (8th Cir. 2010) (standard of review). We decline to consider appellee's challenge to the district court's determination that reversal was warranted for further consideration of Marino's 2005 SSI application, because appellee did

not file a cross-appeal. See Smith v.Sullivan. 982 F.2d 308,314 (8th Cir. 1992) (where appellee fails to file cross-appeal, he is prohibited from attempting to enlarge his rights or lessen his adversary's rights). Accordingly, we affirm. See 8th Cir. R. 47B.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 09-3408

Stephen A. Marino,

Plaintiff - Appellant

v.

Michael J. Astrue,

Commissioner of Social Security,

Defendant - Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis

(4:08-cv-00767-AGF)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. April 30, 2010

Order Entered in Accordance with Opinion:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 09-3408

Stephen A. Marino

Appellant

v.

Michael J. Astrue, Commissioner of Social Security

Appellee

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis

(4:08-cv-00767-AGF)

ORDER

The petition for rehearing by the panel filed by appellant is denied.

June 08, 2010

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

STEPHEN MARINO,

Plaintiff,

vs. Case No. 4:08CV0767 AGF

MICHAEL J. ASTRUE,

Commissioner of Social Security,

Defendant.

MEMORANDUM AND ORDER

This action is before the Court for judicial review of the final decision of the Commissioner of Social Security, finding Plaintiff Stephen Marino was not entitled to disability insurance benefits and supplemental security income ("SSI") under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401-434 and §§ 1381-1384f, respectively. Plaintiff, who was represented by counsel during the administrative proceedings, is proceeding pro se before the Court. For the reasons set forth below, the

Commissioner's decision shall be affirmed in part and reversed and remanded in part.

The parties have consented to the exercise of authority by the undersigned United States Magistrate Judge under 28 U.S.C. § 636(c).

BACKGROUND

Procedural History

This case is before the Court a second time. The record indicates that Plaintiff, who was born on November 27, 1955, had received Social Security disability insurance benefits, due to mental impairments, from September 1991 until December 1993, at which point his benefits ceased because he began working. He applied for benefits again in December 1999, alleging a disability onset date of February 28, 1999, due to major depression, anxiety disorders, and personality disorders, for which he was taking a lot of medication which he claimed kept him very sedated. He asserted that he could no longer handle the stress of his job as a site manager for a housing project, and that he was terminated from this position for falling asleep on the job and for getting into constant arguments with his manager. (Tr. at 171.) Following a hearing on May 30, 2000, an Administrative Law Judge ("ALT") found on August

29, 2000, that Plaintiff was disabled since his alleged onset date. (Tr. at 34-36.)

By letter dated November 10, 2004, the ALJ notified Plaintiff that an investigation of his receipt of benefits had been conducted and that the case had been referred to the ALJ for consideration of whether Plaintiff was engaged in, or able to engage in, substantial gainful activity ("SGA"), and whether reopening the decision for fraud or similar fault was warranted. A second hearing was held before the same ALJ on January 11, 2005. On January 28, 2005, the ALJ found that Plaintiff had engaged in SGA by illegally selling prescription drugs since his new alleged disability onset date of February 28, 1999. Accordingly, the ALJ reversed the August 29, 2000 decision that Plaintiff was entitled to benefits, and denied Plaintiff's December 1999 application. (Tr. at 13-16.)

Upon Plaintiff's action for judicial review, this Court held, by Memorandum and Order dated January 16, 2007, that the ALJ's decision that Plaintiff had engaged in SGA was supported by substantial evidence for the period of August 2004 through the date of the ALJ's decision (January 28, 2005), but that this was not so for the period from Plaintiff's alleged onset date (February 28, 1999) through July 2004, as no evidence was presented regarding SGA during this earlier period. Accordingly, the Court affirmed the denial of

benefits from August 2004, but remanded for further consideration of whether Plaintiff had engaged in SGA between February 28, 1999, and August 2004. The Court noted in addition that "[t]he record may contain evidence that would support a decision that Plaintiff fraudulently misrepresented facts in connection with his December 1999 application for disability benefits, and that he was not disabled at that time." Marino v. Barnhart, No. 4:05CV02036 AGF. Plaintiff did not appeal this decision, and therefore the conclusion that Plaintiff was not disabled from August 2004 through January 25, 2005, operates as res judicata.

Meanwhile, in March 2005, Plaintiff filed an application for SSI, due to the same impairments alleged in his earlier applications. After this application was denied at the initial administrative level on June 8, 2005 (Tr. at 344, 355-59), it was consolidated with the previous claim that had been remanded. The record indicates that Plaintiff has lived in Italy since August 2006. An SSI claimant's entitlement to benefits begins in the month after he filed his application, and he is not entitled to benefits for any month during all of which he is outside of the United States. 20 C.F.R. §§ 416.501, 416.215. Thus the consolidated proceedings before the ALJ involved (1) the remand of the reopened decision regarding the period of February 28, 1999, through July 2004, and (2) the claim for SSI benefits

for the period of April 2005 through July 2006. Plaintiff waived his right to a new hearing before an ALJ, and his counsel submitted a brief in lieu of attending a hearing.

Work History and Application Forms

Plaintiff indicated on his December 1999 application for benefits that he was employed full time as the site manager of a multi-family apartment unit from August 1988 to February 1999, when he was terminated because he had arguments with the management, had trouble concentrating, and was found sleeping on the job. Id. at 156-57, 166, 171. On a questionnaire dated December 15, 1999, Plaintiff wrote that his doctors told him that he should not drive or operate any machinery, that he did not "do much" other than watch TV and listen to music, that if he had to drive anywhere he would wait until two hours had passed since taking his medications, that he left his home only once or twice a week to go to the gas station or post office which were both within blocks of his house, and that he avoided people. Id. at 152-55.

Medical Record

On November 30, 1999, Plaintiff's then-treating psychiatrist P. Mathews, M.D., diagnosed major depressive disorder and anxiety, and a current

Global Assessment of Functioning ("GAF") score of 40. Tr. at 121-23. On April 24, 2000, Dr. Mathews noted that Plaintiff had "relapsed," Id. at 81-86, and from May 1, 2000, to May 11, 2000, Plaintiff was hospitalized with major depressive disorder and anxiety. Id at 87-116. The discharge notes stated that Plaintiff had multiple concerns including the death of his father, being unemployed for the past 14 months, sciatic pain, and feelings of hopelessness and helplessness. Id. at 75.

On July 11, 2000, examining psychologist James Nicholson, Ph.D., diagnosed Plaintiff with a GAF score of 40. Dr. Nicholson indicated that Plaintiff was extremely limited in his ability to cope with stress and in his reliability, with repeated episodes of deterioration in work settings; and markedly limited in several areas of social functioning, including the ability to accept instructions and respond to criticism. Dr. Nicholson assessed Plaintiff's occupational ability as "poor or none" in all aspects, and wrote the following as medical or clinical finding supporting his assessment: "Overt social withdrawal due to anxiety and depression. Chronic anger prevents getting along with others." Id at 59-64.

A GAF score represents a clinician's judgment of an individual's overall ability to function in social, school, or

occupational settings, not including impairments due to physical or environmental limitations. Diagnostic & Statistical Manual of Mental Disorders (4th ed.) (DSM-IV) at 32. GAF scores of 31-40 indicate "[s]ome impairment in reality testing or communication or "major" impairment in social, occupational, or school functioning; scores of 41-50 reflect "serious" impairment in these functional areas; scores of 51-60 indicate "moderate" impairment; scores of 61-70 indicate "mild" impairment

On July 6, 2000, state agency consulting psychologist Michael Armour, Ph.D., upon examining Plaintiff and reviewing the medical records, assessed a current GAF of 50 and diagnosed bipolar II disorder, steroid dependence by history, anxiolytic (a sedative) dependence by history, and depression. Dr. Armour noted that Plaintiff attributed his difficulties in getting along with supervisors, co-workers and customers to his ten-year use of anabolic steroids (for body building). Dr. Armour opined that Plaintiff suffered "moderate to at times significant" impairment in the ability to interact socially and adapt to his environment, and had a poor ability to work with or near others without being distracted by them, to get along with co-workers and peers, and to respond appropriately to changes in a work setting. Id. at 44-53.

The record includes monthly psychiatric treatment notes from February 2001 through November 2004, during which time Plaintiff's psychiatrist was Suren Chiganti, M.D. Plaintiff typically reported that he

was doing "okay," but also reported mood swings and getting into arguments and physical fights with others. Prescribed medications included, among others, Celebrex, Remeron, Klonopin, and Trazadone. Plaintiff was often noted to be "hypo-manic," "hyper-talkative," and anxious. Id. at 255-92. By letter dated April 27, 2003, addressed to "To Whom it May Concern," Dr. Chaganti stated that Plaintiff had recurrent major depression, memory impairment, panic episodes, and an avoidant personality disorder, Id. at 529.

Meanwhile, on October 25, 2001, Plaintiff began seeing endocrinologist Marvin Rosecan, M.D., whose diagnosis included growth hormone deficiency for which Dr. Rosecan treated Plaintiff through September 1, 2004, with Nutropin (human growth hormone therapy). During this period, Plaintiff complained of various aches and pains, including bilateral shoulder pain, difficulty sleeping, and tingling sensation in his hands. Id. at 730-60.

On October 25, 2004, Plaintiff was seen by K. G. Thampy, M.D., in consultation for thyroid disease. Dr. Thampy noted that Plaintiff had a history of anabolic steroid abuse, and no symptoms suggestive of thyroid disease. Dr. Thampy also noted that Plaintiff was not depressed and had a good appetite. Id. at 710-11.

On December 12, 2004, Plaintiff presented to a health center for an annual physical examination and to establish care. He was seen by Elena Lejano, M.D., who noted that Plaintiff used to be a professional weight lifter, but was currently disabled. Examination results were all essentially normal, including mental status, with the exception of a diagnosis of acquired hypothyroidism, for which Plaintiff was prescribed various medications. Id. at 565-69.

On December 15, 2004, Plaintiff presented to Hilary Klein, M.D., complaining of severe anger outbursts and uncontrollable temper and requesting "a fourth opinion" and to be placed on benzodiazepines for problems with his sleep and anger. Dr. Klein opined that "it was most likely" that Plaintiff was using human growth hormone for building muscle mass, and that this usage was contributing to his aggressive nature. She believed that it would be reckless to prescribe any psychotropic medications until Plaintiff was completely off human growth hormones. Id. at 597-99.

Dr. Lejano's notes from December 28, 2004, state "hypothyroidism overcorrected" and Plaintiff was told to decrease his medications. Id. at 564. At a follow-up visit on February 17, 2005, Dr. Lejano observed that Plaintiff did not appear depressed or in acute distress, and that he had an "extremely

muscular upper body." On physical examination she noted decreased range of motion of the neck, decreased lateral flexion, and some stiffness. Id. at 561.

On March 9, 2005, endocrinologist Thomas Baranski, M.D., saw Plaintiff upon referral by Dr. Lejano. Plaintiff asked for human growth hormone, but Dr. Baranski noted that clinically, Plaintiff did not appear to have growth hormone deficiency, and told Plaintiff that testing would need to be done before therapy could be re-initiated. Plaintiff said he would find another endocrinologist. Dr. Baranski also questioned the diagnosis of hypothyroidism. Id. at 588.

The record includes treatment and medical-management notes by psychiatrist George Dowell, M.D., from April through June 2005. These notes report complaints of depression and severe anger, and show diagnoses of bipolar disorder and intermittent explosive disorder. On June 28, 2005, Dr. Dowell assessed a GAF of 40-50. Id. at 525-28. By letter dated February 6, 2006, Dr. Dowell wrote that Plaintiff had been under his care since January 2005. After summarizing Plaintiff's history of psychiatric problems and treatment since 1991, Dr. Dowell diagnosed Plaintiff's GAF as a "chronic 50." Dr. Dowell reported that Plaintiff had not been working for years due to his constant irritability, insomnia, and explosive temper, and opined, "I

certainly would see him as disabled." Id. at 523-24. By letter dated June 11, 2007, to Plaintiff's attorney, Dr. Dowell wrote that he had not seen Plaintiff for almost a year and that he felt that Plaintiff's major issues were "characterological," and that Plaintiff could not work. Id. at 522.

Evidence Related to Fraud and the Engagement in SGA

In its prior decision, the Court recounted the evidence in the record related to fraud and the engagement in SGA on the part of Plaintiff, as follows:

> On October 12, 2004, the Cooperative Disability Investigations Unit ("CDIU") for the Social Security Administration issued a Report of Investigation regarding Plaintiff. The author of the report, a CDIU detective, stated that on September 3, 2004, a St. Louis County Police narcotics detective contacted the CDIU about the ongoing investigation of the illegal sales of prescription drugs by Plaintiff and his wife. The police detective reported that Plaintiff "had been bragging to an undercover informant that he was abusing the Social Security system" and that he and his wife were fraudulently receiving Social Security disability benefits. The CDIU detective joined the investigation and learned

that an undercover officer had purchased prescription drugs from Plaintiff on an unspecified date. Tr. at 196-99.

According to the report, on September 13, 2004, the CDIU detective observed an undercover police officer and a confidential informant, both wearing body microphones, enter Plaintiff's residence. The CDIU detective heard Plaintiff negotiate over prices and instruct the officer and informant on how to use various drugs. Plaintiff said that he used steroids everyday, and that Medicare paid for them. He said that he had a prescription for OxyContin, of which he keeps 30 pills and sells the remaining 60 pills. Plaintiff also said that he had a prescription for Vicodin and that he traded it for other drugs to sell. Plaintiff said that he worked out at a gym everyday. He sold the undercover officer unspecified amounts of Xanax, Anadrol (a testosterone derivative), syringes, and Testosterone Cypionate for a total of $400. The undercover officer asked if she could bring her boyfriend to buy more drugs, and Plaintiff agreed. The CDIU detective observed the undercover officer and the informant exiting Plaintiff's home. Tr. at 199-202. At a debriefing following the drug buy, the informant, who knew Plaintiff "for some time,"

said that Plaintiff had told her in the past that he could get the drug Ecstasy if she wanted it. The informant also said that Plaintiff kept half of his drugs in the kitchen and half in his bedroom with his money. The informant stated that Plaintiff had bragged that he was "stealing" from Social Security by telling the administration he was disabled when he was not. The informant also stated that Plaintiff had bragged about a credit card scam "he runs," and that for $1500 he would teach her how to do it. The informant reported that Plaintiff had told her that he worked out at a certain gym for two hours every morning. Tr. at 202.

On September 14 and 17, 2004, the CDIU detective observed Plaintiff working out at the gym, which was about 12 miles from his house. Another controlled buy was conducted on September 23, 2004. The undercover officer, wearing a body microphone, drove to Plaintiffs home and found Plaintiff standing in front of his house. The CDIU detective observed the two enter Plaintiff's house. Plaintiff was heard explaining the effects of the drugs he had, and saying that he rated his drugs from one to ten. Plaintiff also told the undercover officer to bring her boyfriend over to buy steroids. Plaintiff said that if the

undercover officer brought her boyfriend, Plaintiff would show the boyfriend a book called "Steroids 101." Plaintiff said he would give the undercover officer a "real good deal" because Plaintiff could use the money. The undercover officer gave Plaintiff $500 in exchange for 60 Xanax pills, 60 Anadrol pills, and 30 Lasix (a diuretic) pills. The pills were in three separate baggies and Plaintiff wrote small notes indicating what pills each baggie contained and the number of milligrams. At a debriefing, the undercover detective confirmed that Plaintiff was "the primary source of the drug sale," with Plaintiffs wife present and instrumental in the sale. Tr. at 203-06.

On September 24 and 27, 2004, the CDIU detective again observed Plaintiff working out at the gym. On September 29, 2004, the CDIU detective learned that Plaintiff was receiving controlled substance prescriptions from two named doctors. On October 4, 2004, the fourth and final undercover purchase was made. The same undercover officer entered Plaintiff's home wearing a body microphone and was heard asking Plaintiff for Xanax. Plaintiff replied that he was glad to sell the officer Xanax because, "we can use the money." Plaintiff was also heard saying, "I got a Fed Ex coming

tomorrow with more [drugs]." Plaintiff asked his wife, "How many pills we got back there?" His wife went into another room and returned with the Xanax, and began counting them. The undercover officer purchased 60 Xanax pills for $100. Tr. at 207-09.

On October 10, 2004, a search warrant for Plaintiff's home was executed with the purpose of seizing illegal drugs, drug money, and any information relating to the purchase and resale of illegal drugs. During the search, a .38 caliber handgun, two pouches of what appeared to be marijuana, a Fed Ex box containing 90 Anadrol pills, numerous other bottles of pills (including anti-depressants, anti-anxiety drugs, and anabolic steroids), $16,900 in United States currency, three boxes of syringes, a book titled "Steroids 101," and photographs from June 2004 of Plaintiff dancing and performing with his band, were found and seized. Tr. at 209-13.

ALJ's Decision of November 17, 2007 (Tr. 317-31)

This decision was rendered by an ALJ new to the case. He recognized the res judicata effect of this Court's decision of January 16, 2007, and stated that with respect to Plaintiff's December 1999

application, the issue was whether Plaintiff was disabled from February 28, 1999, through July 31, 2004, and since January 29, 2005. With respect to the application for SSI filed in March 2005, the ALJ explained that the issue was whether Plaintiff was

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The drugs seized were later identified as six bottles of Spironolactone (a diuretic), five bottles of Gabitril (an anti-convulsant), six bottles of Diovan (used to treat hypertension), nine bottles of Anadrol, two bottles of Alprazolam (anti-anxiety medication), one bottle of Lexapro (an anti-depressant), two bottle of Ibuprofen, one bottle of Erythromycin (an antibiotic), one bottle of Furosemide (a diuretic), one bottle of Vitamin D, one bottle of Levothyroxine (a thyroid hormone), one bottle of Cytomel (a thyroid hormone), one bottle of Valtrex (an anti-viral), six bottles of Cyanocobalamin (B12 vitamin), two bottles of ARA Test 2500 (an anabolic steroid), two bottles of Propionat QV 10 (an anabolic steroid), two bottles of Anaboul BD (an anabolic steroid), one bottle of Deca QV300 (an anabolic steroid), two bottles of Miacalcin Nasal Spray, and one tube of Clindamycin Phosphate gel (an antibiotic).

The Court, as it did in its prior decision, takes judicial notice that Plaintiff was indicted on February 24, 2005, on nine counts of criminal activity committed in September and October 2004, including one count of Social Security fraud and eight counts related to the drug activity uncovered in the above-described investigation. U.S. v. Marino, No. 4:05CR110 ERW. On June 27, 2005, Plaintiff pled guilty to one count of distribution based upon the September 23, 2004 buy, and to the forfeiture of the $16,900, and the government dismissed the other counts. On September 28, 2005, Plaintiff was sentenced to one month imprisonment.

disabled since the time he filed the application (because SSI is not retroactive to anytime prior to the filing of an application) and August 2006, when Plaintiff left the United States. The ALJ found that during these periods of time, Plaintiff had not engaged in SGA, but that he was not disabled.

The ALJ found that Plaintiff had a history of OxyContin abuse and dependency, anabolic steroid abuse and dependency, anxiolytic dependency, marijuana abuse, and "a possible substance induced mood disorder." The ALJ found that although Plaintiff had been diagnosed with a multitude of other impairments as well, including "anxiety, an avoidant personality disorder, depression, a bipolar disorder, hypertension, a growth hormone disorder, etc.," the record showed that these impairments, singularly or in combination, were never severe for 12 consecutive months with treatment. Rather, according to the ALJ, Plaintiff's complaints related to such diagnoses were related to attempts to obtain prescription drugs to sell or to abuse. The ALJ stated that therefore, he found that Plaintiff s impairments did not meet or equal the requirements of a deemed-disabling impairment listed in the Commissioner's regulation, 20 C.F.R. Pt. 404, Subpt. P, App. 1.

The ALJ summarized the medical treatment notes through October 2004, and found that they were "very inconsistent with allegations of any mental and/or physical impairments imposing

disabling limitations of function, for twelve consecutive months in duration." The ALJ believed that the later medical evidence, including Dr. Buranski's notes, "when considering the evidence of his daily workouts, his 'extremely muscular' body, the prior findings of dependencies and abuse, and the evidence of his selling of human growth steroids, do indicate that [Plaintiff] was actually drug seeking and was not with the pain of deficiencies that he alleges."

The ALJ found that Dr. Dowell's February 6, 2006 opinion that Plaintiff was disabled was "very inconsistent with previous findings that [Plaintiff's] steroid abuse lends itself to his mental status changes and his aggressive nature," and that Dr. Dowell's observation that Plaintiff had difficulty getting along with people was "grossly inconsistent" with the fact that Plaintiff could work out with others on a daily basis. Dr. Dowell's statement that Plaintiff was "disabled" was not credited because it was not clear to the ALJ that Dr. Dowell understood that term as it was defined by the Social Security Act. Lastly, the ALJ stated that Dr. Dowell's June 11, 2007 opinion that Plaintiff's problems were "characterological" was not an opinion that any disability existed as the result of "a specific mental impairment."

Other factors noted by the ALJ as undermining Plaintiff's credibility regarding

allegations of disability since February 1999, included the absence of treatment records since Plaintiff moved to Italy, and the absence of documented persistent and adverse side effects from his medications.

The ALJ then recounted the facts of the criminal investigation set forth above, and stated that this evidence "establishes that [Plaintiff] certainly does more than just sitting around as alleged and that he has no difficulties traveling further than he alleged he can do, . . . interacting with others, on a dance floor, in a gym, or in a social environment. "The ALJ further stated that this evidence indicated that "any complaints of [mental problems] to treating physicians, were for the purpose of obtaining drugs for reasons other than treatment including recreational use and sales." The ALJ found that indeed, Plaintiff "fraudulently misrepresented facts in connection with his December 1999 application for disability benefits." The ALJ went on to comment that the facts surrounding the criminal investigation,

> even considered outside the realm of medical records, establish that [Plaintiff] has not been disabled at any time since February 1999 and that he utilized the Social Security Administration ... for his own personal profit and enjoyment. [Plaintiff's] own statement establishes that he even did not consider

> himself disabled. [Plaintiff s] own statements establish that he made false statements and/or misrepresented material facts to the Social Security Administration (and even to his treating physicians) for the purpose of obtaining [disability benefits] ....
>
> Id. at 329.

The ALJ determined that Plaintiff "may have some difficulties coping with stress or interacting with others," but that these were not established by the medical evidence as existing for 12 consecutive months. The ALJ held further that Plaintiff had not met his burden of establishing a residual functional capacity ("RFC") of severe limitations of 12-month duration, "or at the very least," such an RFC "existing outside the realm of drug abuse, drug dependency and drug sales." The ALJ stated that even if such disabling limitations existed, they were "likely the result of [Plaintiffs] anabolic steroid abuse and other drug abuses and dependencies." The ALJ referenced the statutory provision that an individual shall not be considered to be disabled if drug addiction would be a contributing factor material to the finding of disability (42 U.S.C. § 423(d)(2)(C)), and concluded that Plaintiff was not entitled to benefits based upon his December 1999 and March 2005 applications.

DISCUSSION

Plaintiffs Entitlement to Benefits from February 28.1999. to August 2004

Upon remand, the ALJ in essence reached dual conclusions with respect to Plaintiffs entitlement to benefits from February 28, 2009, to August 2004: (1) that the medical evidence did not establish that Plaintiff was disabled during this period; and (2) that benefits were obtained by fraud. The Court believes that the first conclusion, standing alone, would not provide a proper basis for affirming the ALJ's decision. Absent a valid finding of fraud, there would have been no basis under 20 C.F.R. § 416.1488(a) for the ALJ to reopen the decision of August 29, 2000, which found that Plaintiff was disabled as of February 28, 1999. This regulation provides as follows with regard to the reopening of a decision in a disability case:

> A determination, revised determination, decision, or revised decision may be reopened .... [a]t any time if . . . [i]t was obtained by fraud or similar fault. In determining whether a determination or decision was obtained by fraud or similar fault, we will take into account any physical, mental, educational, or linguistic limitations (including any lack of facility with the English

> language) which you may have had at the time.

20 C.F.R. § 404.988(c) (1).

The Court will accordingly consider the ALJ's finding of fraud. The Social Security Administrations Program Operations Manual ("POM") § GN 04020.010 defines "fraud or similar fault" in this context as follows:

1. Fraud

Fraud exists when a person either:

a. Makes or causes to be made with intent to defraud, a false statement or misrepresentation of a material fact for use in determining rights to Social Security benefits; or
b. With intent to defraud, conceals or fails to disclose a material fact for use in determining rights to Social Security benefits.

2. Similar Fault

Similar fault exists when a person either:

a. Knowingly makes an incorrect or incomplete statement that is material to the determination; or

b. Knowingly conceals information that is material to the determination. However, fraudulent intent is not required.

The POM explains that in order to reopen a determination under this provision, there must be a preponderance of evidence to prove the existence of fraud. If fraud cannot be established (no preponderance of evidence establishing knowledge and intent), but it can be established by a preponderance of evidence that the claimant did something wrong (knowingly, but intent cannot be established), then similar fault is established and reopening is permissible.

When an ALJ finds fraud in this context, the reviewing court's inquiry is whether the ALJ's finding that the claimant applied for benefits with fraudulent intent, is supported by substantial evidence. Britton v. Sullivan, 908 F.2d 328, 330 (8th Cir. 1990). Substantial evidence in this context "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. Courts have held that "[b]ecause errors can cause considerable hardship, [this regulation] should be liberally applied in favor of beneficiaries. See Dugan v. Sullivan. 957 F.2d 1384, 1389 (7th Cir. 1992); McCuin v. Sec'v of HHS, 817 F.2d 161, 174 (1st Cir. 1987); Cutler v. Weinberger, 516 F.2dl282, 1285 (2d Cir. 1975).

Construing the record liberally in favor of the beneficiary, a close question is presented here as to whether the ALJ's finding of fraud from February 1999, is supported by substantial evidence. Upon review of the record, however, the Court believes that the ALJ's decision on this matter should be affirmed. The most damaging evidence against Plaintiff would be his own statements that he was abusing the Social Security system and getting disability benefits to which he was not entitled. The Court, however, will not base its decision on this evidence because this evidence is in the form of a hearsay allegation by a confidential informant. Nevertheless, the nature and scope of Plaintiff's drug operation - namely, illegally selling drugs that he was obtaining from treating physicians -- lend support to the ALJ's determination that Plaintiff engaged in fraud or similar fault in obtaining his benefits pursuant to his December 1999 application.

Other evidence in the record also lends support to the ALJ's finding. Plaintiff's representations in December 1999 that he rarely left his house, avoided people, and did little more than watch TV and listen to music are at odds with the evidence from the criminal investigation (albeit from a later point in time), which showed Plaintiff interacting with others, driving to and from a gym 12 miles from his house, and playing in a band; and

are undermined by the drug-seeking behavior noted by the ALJ.

Plaintiffs Claim of Disability from March 2005 until August 2006

The question with regard to this period is whether substantial evidence in the record as a whole supports the ALJ's decision that Plaintiff was not entitled to SSI from March 2005, when he filed his application for such benefits, until August 2006, when he moved to Italy. In reviewing the denial of Social Security disability benefits, a court must affirm the Commissioner's decision "so long as it conforms to the law and is supported by substantial evidence on the record as a whole." Reed v. Barnhart, 399 F.3d 917, 920 (8th Cir. 2005) (citation omitted). The court's review "is more than an examination of the record for the existence of substantial evidence in support of the Commissioner's decision"; the court must "also take into account whatever in the record fairly detracts from that decision." Id. Reversal is not warranted, however, merely because substantial evidence would have supported an opposite decision. Id.

To be entitled to benefits, a claimant must demonstrate an inability to engage in any substantial gainful activity which exists in the national economy, by reason of a medically

determinable impairment which has lasted or can be expected to last for not less than 12 months. 42 U.S.C. § 1392c(a)(3)(A). Both the impairment and the inability to engage in substantial gainful employment must last or be expected to last for not less than 12 months. Barnhart v. Walton. 535 U.S. 212, 217-22 (2002).

The Commissioner has promulgated regulations, found at 20 C.F.R. § 416.920, establishing a five-step sequential evaluation process to determine disability. The Commissioner begins by deciding whether the claimant is engaged in substantial gainful activity. If so, benefits are denied. If not, the Commissioner decides whether the claimant has a "severe" impairment or combination of impairments. A severe impairment is one which significantly limits a person's physical or mental ability to do basic work activities. Id. § 416.921(a).

A special technique is used to determine the severity of mental disorders. This technique calls for rating the claimant's degree of limitations in four areas of functioning: activities of daily living; social functioning; concentration, persistence, or pace; and episodes of decompensation. Id. § 416.920a(c)(3). The limitation in the first three functional areas is assigned a designation of either "none, mild, moderate, marked, [or] extreme." Id. §416.920a(c)(4). The degree of limitation in regard to episodes of

decompensation is determined by application of a four-point scale: "[n]one, one or two, three, four or more." Id. When the degree of limitation in the first three functional areas is "none" or "mild" and is "none" in the area of decompensation, impairments are not severe, "unless the evidence otherwise indicates that there is more than a minimal limitation in [a claimant's] ability to do basic work activities." Id. § 416.920a(d)(1).

The ability to do basic work activities includes the ability for understanding, carrying out, and remembering simple instructions; use of judgment; responding appropriately to supervision, co-workers, and usual work situations; and dealing with changes in a routine work setting. Id. § 416.921(b).

If the claimant does not have a severe impairment that meets the duration requirement, the claim is denied. If the impairment or combination of impairments is severe and meets the duration requirement, the Commissioner determines at step three whether the claimant's impairment meets or is equal to one of the deemed-disabling impairments listed in Appendix 1. If not, the Commissioner asks at step four whether the claimant has the RFC to perform his past relevant work as he actually performed it, or as generally required by employers in the national economy. If so, the claimant is not disabled. If he cannot perform his past relevant work, the burden of proof shifts at step

five to the Commissioner to demonstrate that the claimant retains the RFC to perform work that is available in the national economy and that is consistent with the claimant's vocational factors age, education, and work experience.

If a claimant can perform the full range of work in a particular exertional category of work (heavy, medium, light, and sedentary) listed in the Commissioner's regulations, the Commissioner may carry this burden by referring to the Guidelines, which are fact-based generalizations about the availability of jobs for people of varying ages, educational backgrounds, and previous work experience, with differing degrees of exertional abilities. Where a nonexertional impairment such as depression significantly limits the claimant's ability to perform the full range of work in a particular category, the Commissioner cannot carry this burden by relying exclusively on the Guidelines, but must consider testimony of a VE on the availability of jobs that a person with the claimant's RFC and vocational factors could perform. Baker v. Barnhart, 457 F.3d 882, 894-95 (8th Cir. 2006).

Here, the Court believes that remand is warranted for the ALJ's further consideration of Plaintiff's entitlement to SSI based on Plaintiff's March 2005 application. The ALJ found that Plaintiff failed to meet his burden at step two of the evaluation process. Although the ALJ also made a

step-three finding (failure to meet a listing impairment), the essential finding was that Plaintiff did not establish severe mental functional limitations. "The sequential evaluation process may be terminated at step two only when the claimant's impairment or combination of impairments would have no more than a minimal impact on [his or] her ability to work." Caviness v. Massanari, 250 F.3d 603, 605 (8thCir.2001).

The Court finds problematic some of the reasons given by the ALJ for discrediting evidence supporting Plaintiff's allegations with regard to the period of time at issue — most notably, the ALJ's reasons for not giving weight to the GAF assessment of 50 by Dr. Dowell, a treating psychiatrist. Generally, an ALJ is to give "a treating source's opinion on the issue[s] of the nature and severity of [an] impairment[ ]" controlling weight if such opinion "is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. § 416.927(d)(2).

The Court recognizes that an ALJ may grant less weight to a treating physician's opinion when that opinion conflicts with his own treatment notes or with other substantial medical evidence contained within the record, see, e.g., Prosch v. Apfel, 201 F.3d 1010, 1013-14 (8th Cir. 2000), but this is not the case here. Dr. Dowell's GAF assessment of a "chronic 50"

was consistent with his treatment notes, and there is no medical evidence of a higher GAF during this period. To discount Dr. Dowell's opinion of the severity of Plaintiff s limitation because the June 11, 2007 letter did not state that the limitation existed as the result of specific mental impairment is to read the letter in isolation, and not in conjunction, with Dr. Dowell's treatment notes.

Furthermore, other than Dr. Dowell's opinion, there is no opinion in the record by a medical source addressing Plaintiff's mental ability to function in the workplace during the period at issue, nor do the medical records allow for an inference of how Plaintiff's limitations would allow him to function in a work environment. See Cox v. Astrue, 495 F.3d 614, 620 & n. 9 (8th Cir. 2007) ("Because a claimant's RFC is a medical question, an ALJ's assessment of it must be supported by some medical evidence of the claimant's ability to function in the workplace."). The Court does not believe that there is a sufficient medical basis in the record to support the ALJ's finding that if Plaintiff's mental impairments were disabling, such disability was "likely the result of [Plaintiff's] anabolic steroid abuse and other drug abuses and dependencies." Under these circumstances, remand is appropriate for further consideration, and if needed, further development of the record. See Gibbons v. Astrue, No. 4:08-CV-523 CAS, 2009 WL 2948445, at *21 (E.D. Mo. Sept. 14,

2009) (reversing and remanding ALJ's decision where there was no medical evidence addressing the plaintiff s mental ability to function in the work place); see also Brueggemann v. Barnhart, 348 F.3d 689, 693 (8th Cir. 2003) (reversing and remanding where the plaintiff had a GAF of 50 and the ALJ did not go through the five-step evaluation process to determine the materiality of substance abuse disorder to the plaintiff's mental impairments).

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that the decision of the Commissioner is **AFFIRMED** with respect to Plaintiff's December 1999 application for benefits, and **REVERSED** and **REMANDED** with respect to Plaintiff's March 2005 application.

IT IS FURTHER ORDERED that all pending motions are **DENIED.**

A separate Judgment shall accompany this Memorandum and Order.

/s/ AUDREY G. FLEISSIG

UNITED STATES MAGISTRATE JUDGE

Dated on this 29th day of September, 2009.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

STEPHEN MARINO,

Plaintiff,

vs. Case No. 4:08CV0767 AGF

MICHAEL ASTRUE,

Commissioner of Social Security,

Defendant.

JUDGMENT

Pursuant to the Memorandum and Order issued herein on the day,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the decision of the Commissioner is **AFFIRMED** with respect to Plaintiff's December 1999 application for benefits, and **REVERSED** and **REMANDED** with respect to Plaintiff's March 2005 application.

/s/ AUDREY G. FLEISSIG

UNITED STATES MAGISTRATE JUDGE

Dated this 29th day of September, 2009.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

STEPHEN A. MARINO,

Plaintiff,

vs. Case No. 4:05CV02036 AGF

JO ANNE B. BARNHART,

Commissioner of Social Security,

Defendant.

MEMORANDUM AND ORDER

This action is before the Court for judicial review of the final decision of the Commissioner of Social Security, reopening and reversing a prior decision that Plaintiff Stephen Marino was eligible for disability insurance benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-434, and supplemental security income under Title XVI of the

Act, 42. U.S.C. §§ 1381-1384f. For the reasons set forth below, the Court will reverse the decision in part and remand the case for further proceedings.

Plaintiff, who was born on November 27, 1955, applied for benefits on December 8, 1999, alleging a disability onset date of February 28, 1999, due to major depression, anxiety disorders, and personality disorders. Tr. at 171. Following a hearing on May 30, 2000, an Administrative Law Judge ("ALJ") found on August 29, 2000, that Plaintiff was disabled since his alleged onset date. Tr. at 34-36. The record suggests that Plaintiff previously had received disability insurance benefits from September 1991 until December 1993, at which point his benefits ceased due to his working. Tr. at 197.

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1 The parties have consented to the exercise of authority by the undersigned United States Magistrate Judge under 28 U.S.C. § 636(c).

On October 24, 2004, Plaintiffs case was reopened following a criminal investigation into Plaintiffs sale of prescription drugs. A second hearing was held before the same ALJ on January 11, 2005. On January 28, 2005, the AU found that Plaintiff had engaged in substantial gainful activity ("SGA") since his alleged disability onset date. The ALJ reversed the previous decision that Plaintiff was entitled to benefits and denied his December 8, 1999

application for benefits. The Appeals Council of the Social Security Administration declined to review the ALJ's decision. Plaintiff has thus exhausted all administrative remedies and the ALJ's January 28, 2005 decision stands as the final agency action.

Plaintiff argues that the ALJ erred in finding that Plaintiff was not disabled. Specifically, Plaintiff argues that the ALJ erred because Plaintiff has disabling impairments and is unable to work; Plaintiff was denied his right to be represented by counsel at the January 11, 2005 hearing and did not receive a full and fair hearing; Plaintiff has not engaged in SGA, and alternatively, there was no evidence that Plaintiff engaged in SGA before August 2004.

BACKGROUND

Work History

Plaintiff self-reported his work history when he applied for benefits in 1999. He wrote that he had been employed as the site manager of a multi-family apartment unit from August 1988 to December 1991, earning from $24,000 to $30,000 per year; and from January 1994 to February 1998, earning from $36,000 to $40,000 per year. Tr. at 156-57. He reported that he ceased working there in 1998 because he was terminated. Tr. at 166. Plaintiff also wrote that from August 1998 to February 1999, he

was employed full-time as a site manager with Greystone Partners, earning $40,000 per year. Id. Plaintiff wrote that he was terminated from this job because he had arguments with the management, had trouble concentrating, and was found sleeping on the job. Tr. at 171.

Criminal Investigation

On October 12, 2004, the Cooperative Disability Investigations Unit ("CDIU") for the Social Security Administration issued a Report of Investigation regarding Plaintiff. The author of the report, a CDIU detective, stated that on September 3, 2004, a St. Louis County Police narcotics detective contacted the CDIU about the ongoing investigation of the illegal sales of prescription drugs by Plaintiff and his wife. The police detective reported that Plaintiff "had been bragging to an undercover informant that he was abusing the Social Security system" and that he and his wife were fraudulently receiving Social Security disability benefits. The CDIU detective joined the investigation and learned that an undercover officer had purchased prescription drugs from Plaintiff on an unspecified date. Tr. at 196-99.

According to the report, on September 13, 2004, the CDIU detective observed an undercover police officer and a confidential informant, both wearing body microphones, enter Plaintiffs

residence. The CDIU detective heard Plaintiff negotiate over prices and instruct the officer and informant on how to use various drugs. Plaintiff said that he used steroids everyday, and that Medicare paid for them. He said that he had a prescription for OxyContin, of which he keeps 30 pills and sells the remaining 60 pills. Plaintiff also said that he had a prescription for Vicodin and that he traded it for other drugs to sell. Plaintiff said that he worked out at a gym every day. He sold the undercover officer unspecified amounts of Xanax, Axiadrol (a testosterone derivative), syringes, and Testosterone Cypionate for a total of $400. The undercover officer asked if she could bring her boyfriend to buy more drugs, and Plaintiff agreed. The CDIU detective observed the undercover officer and the informant exiting Plaintiffs home. Tr. at 199-202.

At a debriefing following the drug buy, the informant, who knew Plaintiff "for some time," said that Plaintiff had told her in the past that he could get the drug Ecstasy if she wanted it. The informant also said that Plaintiff kept half of his drugs in the kitchen and half in his bedroom with his money. The informant stated that Plaintiff had bragged that he was "stealing" from Social Security by telling the administration he was disabled when he was not. The informant also stated that Plaintiff had bragged about a credit card scam "he runs," and that for $1500 he would teach her how to do it. The

informant reported that Plaintiff had told her that he worked out at a certain gym for two hours every morning. Tr. at 202.

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On October 10, 2004, a search warrant for Plaintiffs home was executed with the purpose of seizing illegal drugs, drug money, and any information relating to the purchase and resale of illegal drugs. During the search, a .38 caliber handgun, two pouches of what appeared to be marijuana, a Fed Ex box containing 90 Anadrol pills, numerous other bottles of pills (including anti-depressants, anti-anxiety drugs, and anabolic steroids), 2 $16,900 in United States currency, three boxes of syringes, a book titled "Steroids 101," and photographs from June 2004 of Plaintiff dancing and

performing with his band, were found and seized. Tr at 209-13.

Reopening of Plaintiffs Case and Evidentiary Hearing of January 11, 2005

By letter dated November 10, 2004, the ALJ notified Plaintiff that an investigation of his receipt of benefits had been conducted and that the case was referred to the ALJ for consideration of whether Plaintiff was engaged in, or able to engage in, SGA, and whether Plaintiff was engaged in, or able to engage in, SGA, and whether reopening the decision for fraud or similar fault was warranted. The letter notified Plaintiff that he had the right to be heard on the matter, and an attachment (absent from the

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2 The drugs seized were later identified as six bottles of Spironolactone (a diuretic), five bottles of Gabatril (an anti convulsant), six bottles of Diovan (used to treat hypertension), nine bottles of Anadrol, two bottles of Alprazolam (anti-anxiety medication), one bottle of Lexapro (an anti-depressant), two bottles of Ibuprofen, one bottle of Erythromycin (an antibiotic), one bottle of Furosemide (a diuretic), one bottle of Vitamin D, one bottle of Levothyroxine (a thyroid hormone), one bottle of Cytomel (a thyroid hormone), one bottle of Valtrex (an anti viral), six bottles of Cyanocobalamin (B12 vitamin), two bottles of ARA Test 2500 (an anabolic steroid), two bottles of Propionat QV 10 (an anabolic steroid), two bottles of Anaboul BD (an anabolic steroid), one bottle of Deca QV300 (an anabolic steroid), two bottles of Miacalcin Nasal Spray, and one tube of Clindamycin Phosphate gel (an antibiotic)

record) informed Plaintiff of the hearing date. In addition, the letter told Plaintiff that he had the right to be represented by an attorney at the hearing, and further stated "considering the possible adverse consequences that could result from a decision, representation by an attorney is strongly advised." Plaintiff was also told that prior to the hearing, he and his attorney had the right to review all of the exhibits that would be relied upon in making a determination, and the right to testify and present witnesses and submit exhibits into evidence at the hearing. Tr. at 231-32.

Plaintiff first testified at the January 11, 2005 hearing that he was represented by counsel Jim Haeffner, but that Mr. Haeffner was undergoing treatment for cancer and would soon be starting six weeks of chemotherapy and radiation. The ALJ confirmed that he had offered Plaintiff, apparently immediately before going on the record, the opportunity to postpone the case so that Plaintiff could hire another lawyer, but that it was Plaintiffs desire not to have another lawyer. Plaintiff testified that he would answer "anything pertaining to [his] disability," but he that he would "plead the fifth" in

3. In a Memorandum to the Court, filed on April 25, 2006, Plaintiff states that the ALJ had previously continued the hearing. Doc. #13 at 13.

response to any other questions until his attorney could be present. Plaintiff stated that without an attorney, "I don't know what I'm doing." Tr. at 19-20.

The ALJ proceeded with the hearing and recounted that Plaintiff had been found disabled following a hearing in 2000, that Plaintiffs disability onset date was February 28, 1999, and that Plaintiffs disability was major depression recurrent with panic problems. The ALJ further stated that there was currently an "issue" as to whether Plaintiff engaged in SGA after his disability onset date, and that the alleged SGA was the illegal sale of narcotics. Plaintiff asked if that was considered SGA, and the ALJ responded that SGA is "any type of activity that would show that you had the ability to work and make money." Plaintiff stated that it was his understanding that SGA meant a claimant had to work more than 20 hours a week or 80 hours a month and make more than $800 a month. The ALJ said, "I don't think it's all that clear cut." Tr. at 20-21.

The ALJ stated that the present hearing was being held because of the CDIU report, and that because Plaintiff indicated that he was not going to answer questions about the report, they had "nothing to proceed further." Plaintiff then said yes, they did, and proceeded to discuss some of the records. Tr. at 22. Plaintiff stated that he had been admitted to a hospital by his treating psychiatrist,

Surendra Chiganti, M.D., in 2000. The ALJ asked for copies of reports from Dr. Chiganti and from the hospital. Plaintiff stated that he saw Dr. Chiganti every month since he had been hospitalized, that he had monthly reports from those visits. The ALJ admitted those reports into the record. Plaintiff then requested that copies of his entire record be sent to "my workers comp." The ALJ informed Plaintiff that he could come to the Social Security office and make copies of anything he wanted. Tr. at 22-25.

Plaintiff said that he thought he was at the hearing about SGA, and that he had his 2003 tax return with him. He testified that he "reported every bit of musician income that I've ever had when I started the band back in September of '03." He stated that he had updated the Social Security office on his income on a monthly basis up to and including July 2004, when his band "quit on me." Tr. at 25-26.

Plaintiff testified that he had been seeing Dr. Chiganti since early 2000 on a monthly basis and that Dr. Chiganti had kept him on "a roller coaster of drugs." Plaintiff stated that he was on Lexapro, Trazadone, Halprozolane, and Gabitril, and that he was going to a new psychiatrist. Plaintiff said that he weaned himself off Lexapro because he was getting "too wild, too violent, and stuff like that." He testified that he also stopped taking the Trazadone because, although it helped him sleep, its side effects were anxiety, irritability, anger, and hostility, and

that taking it would be "like pouring gasoline on a fire." Plaintiff stated that he had not taken any prescription medication since December 29, presumably of 2004, and that he was currently taking three Tylenols a day. He said, "I'm ruining everybody around me," and, "I have problems." Plaintiff stated that he tried to keep his band together, but that the band members quit because they thought he was crazy. Tr. at 26-27.

Plaintiff testified that "all I got is that lousy . . . $864," presumably referring to his monthly disability benefits. He said that he tried, but never worked for very long at one job. Plaintiff stated "I feel like I need to defend myself, but I don't want to say nothing wrong." Plaintiff asked the ALJ if he was going to make a disability decision on Plaintiffs mental state, or on "what I did wrong" in St. Louis County. The ALJ responded that he was going to take everything in the record into account. Tr. at 27-29.

ALJ's Decision of January 28, 2005

The ALJ held that Plaintiff was not disabled as he was engaged in SGA, specifically, the illegal sale of drugs. The ALJ pointed out that a prior benefits decision may be reopened at any time if obtained by fraud or similar fault, citing 20 C.F.R. §404.988 (c), and that he reopened Plaintiffs case after CDIU advised him to do so. Tr. at 13-14.

The ALJ concluded that the sale of illegal drugs can constitute SGA. He cited Corrao v. Shalala, 20 F.3d 954 (9th Cir. 1994), which held that claimant's illegal activities can be both substantial and gainful, and that the amount of activity and the mental or physical exertion involved should be considered to determine whether a claimant performed SGA. The ALJ then found that since Plaintiff chose not to testify regarding his alleged illegal activity, the ALJ's decision had to be founded on the evidence in the record. Tr. at 14.

The ALJ relied on the CDIU report of October 2004, to determine that Plaintiff was engaged in SGA. The ALJ found that although Plaintiff said in his application for benefits that he left his home infrequently and had difficulty being around people, the CDIU investigation revealed that Plaintiff frequently drove 24 miles round-trip to work out at a gym, and was often in crowds when he performed with the band he formed. The ALJ also found that "the evidence of the record is persuasive that the claimant's illegal activity has been of long term since receiving his disability benefits . . . ." The ALJ relied on several statements Plaintiff had made to the confidential informant and undercover officer contained in the CDIU report to find that Plaintiffs illegal business was of an "extensive nature." Plaintiff had told the informant that he could get the drug Ecstasy if the informant wanted it, and told the

officer that he rated all of his drugs on a scale of one to ten. Plaintiff also instructed the officer on how to take the pills. Additionally, the ALJ noted that Plaintiff had an extensive inventory of drugs and $16,900 in cash when his home was searched. Tr. at 14-15.

The ALJ concluded that Plaintiffs illegal activity constituted SGA and that "[s]ince the alleged onset date, [Plaintiff] has not been unable to perform substantial gainful activity for any continuous period of 12 months." The ALJ then amended his prior decision so that Plaintiffs December 8, 1999 application for benefits was denied. Tr. at 14-15.

Plaintiffs Indictment and Plea

This Court takes judicial notice that Plaintiff and his wife (whose own disability benefits were also terminated due to the drug activity) were indicted in this district on February 24, 2005, on nine counts of criminal activity committed in September and October 2004, including one count of Social Security fraud and eight counts related to the drug activity uncovered in above-described investigation. U.S. v. Marino, No. 4:05CR110 ERW. On June 27, 2005, Plaintiff pled guilty to one count of distribution based upon the September 23, 2004 buy, and to the forfeiture of the $16,900, and the government

dismissed the other counts. On September 28, 2005, Plaintiff was sentenced to one month imprisonment.

DISCUSSION

Standard of Review and Relevant Statutes and Regulations

In reviewing the denial of Social Security disability benefits, "the findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). The substantial evidence test, which is also applicable to the termination of disability benefits, "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Britton v. Sullivan 908 F.2d 328, 330 (8th Cir. 1990) (citing Richardson v. Perales. 402 U.S. 389, 401 (1971)).

To be entitled to disability benefits, a claimant must demonstrate an inability to engage in any SGA which exists in the national economy, by reason of a medically determinable impairment which has lasted or can be expected to last for not less than 12 months. 42 U.S.C. § 423(d)(1)(A). If a claimant is actually engaged in SGA, he will be found to be not disabled, regardless of his medical condition. 20 C.F.R. § 404.1520(b). SGA is defined in the regulations as activity that is both substantial and gainful. 20 C.F.R.§ 404.1572. Substantial activity is

"work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part time basis. . . " Id. Gainful activity is work activity done for pay or profit, whether or not a profit is realized. Id.

If a claimant is self-employed, there are additional considerations when determining whether he engaged in SGA. The Commissioner is to consider the claimant's activities and their value to the business. A claimant will be found to have engaged in SGA if his activity is comparable to individuals in the community who are in the same or similar business as a means of livelihood; or income from his activity meets the test in § 404.1574(b)(2); or his activity is significant to the operation of the business and the claimant receives a substantial income from the business. 20 C.F.R. § 404.1575(a)(2)(i).

However, even if a claimant earns less than the presumptive amount, the claimant can still be

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4 Under this regulation, for months before January 2001, the Commission found that a claimant was presumptively engaged in SGA if the claimant's average monthly earnings equaled or surpassed a set amount. In 2000 this amount was $700. Beginning in 2001, a claimant is presumptively engaged in SGA if the claimant's average earnings equal or surpass the larger of (a) the previous year's earnings or (b) an amount calculated using a formula incorporating the national wage index.

found to have engaged in SGA. Pickner v. Sullivan, 985 F.2d 401, 403 (8th Cir. 1993) ("Although earnings below the guidelines will 'ordinarily' show that an employee has not engaged in [SGA], earnings below the guidelines will not conclusively show that an employee has not engaged in [SGA]."); Reeder v. Apfel, 214 F.3d 984, 989 (8th Cir. 2000) (upholding district court's determination that plaintiff was engaged in SGA because the work she did involved significant physical or mental activity, even assuming she earned less than the amount suggested by the regulations).

The legality of the work activity is not relevant. "The work without regard to legality, that you have done during any period in which you believe you are disabled may show that you are able to work at the [SGA] level." 20 C.F.R. § 404.1571; see also Jones v. Shalala, 21 F.3d 191, 193-94 (7th Cir. 1994) (holding that claimant was engaged in SGA when activity was stealing); Bell v. Comm'r of Soc. Sec., 105 F.3d 244, 247-48 (6th Cir. 1996) (holding that claimant was engaged in SGA when activity was prostitution).

A benefits decision can be reopened at any time if the initial determination was obtained by "fraud or similar fault." 20 C.F.R. § 404.988(c); see also Marshall v. Chater, 75 F.3d 1421, 1426-27 (10th Cir. 1996) (holding that reopening was proper for fraud or similar fault or because there was new and

material evidence when claimant was earning more than he reported); Heins v. Shalala, 22 F.3d 157, 162-63 (7th Cir. 1994) (holding that reopening was proper for fraud or similar fault when claimant was a widow receiving her late husband's benefits and did not report that she was remarried); Britton, 908 F.2d at 331-33 (holding that reopening was proper for fraud or similar fault when claimant was operating a profitable business before and after receiving benefits).

Plaintiffs Mental Disorders

Plaintiff first argues that he has a disabling impairment and that the ALJ therefore erred in reversing the award of benefits. As stated above, however, Plaintiffs medical condition is not relevant if he was engaged in SGA. 20 C.F.R. § 404.1520(b). In this proceeding, the severity of Plaintiff s mental disorders is not at issue.

Plaintiffs Right to Representation by Counsel

Plaintiffs second argument is that he was denied his right to representation by counsel at the January 11, 2005 hearing. A claimant is permitted to be represented by an attorney in proceedings before the Social Security Administration. 20 C.F.R. § 416.1505(a). The Commissioner has the duty to ensure that the claimant is aware of this statutory right to have counsel at a scheduled hearing, but is

not required to provide counsel. 42 U.S.C. 406(c). If properly informed of this right, the claimant may waive it. Bimon v. Shalala, 13 F.3d 243, 245 (7th Cir. 1994). Plaintiff must be informed not only of his right to counsel, but also of the availability of free legal aid or a contingency arrangement and the limitation of legal fees to 25 percent of past due benefits. Id.

In this case, Plaintiff clearly was aware that he had the right to representation. Prior to his first hearing in 2000, which resulted in the ALJ's determination that Plaintiff was eligible for benefits, Plaintiff received a letter from the Commissioner informing him of his right to a hearing and to be represented at the hearing, including the availability of free counsel and contingency arrangements, and the 25 percent limitation on legal fees. Tr. at 132. Plaintiff, in fact, exercised his right by having an attorney present at the May 30, 2000 hearing. Additionally, the November 10, 2004 letter informed Plaintiff that his case may be reopened, that a hearing was set, and that Plaintiff had the right to be represented by an attorney at the hearing and "considering the possible adverse consequences that could result from a decision, representation by an attorney is strongly advised." Tr. at 231-32.

The record reflects that Plaintiff declined the ALJ's offer for an additional continuance to find another attorney. The Court concludes the ALJ was

not obligated to continue the hearing for a minimum of two months, perhaps longer, so that Plaintiff could proceed with the attorney of his choice. The Court finds that under the circumstances of the case, by turning down the ALJ's offer for a continuance to obtain a different lawyer, Plaintiff waived his right to representation at the January 11, 2005 hearing. Additionally, during the hearing, when the ALJ stated that they could not proceed because Plaintiff indicated that he was not going to answer questions about the CDIU report, Plaintiff said that they should proceed. Cf. Carter v. Chater, 73 F.3d 1019, 1021 (10th Cir. 1996) (holding that when claimant was advised prior to the hearing of her right to counsel, she waived it when she proceeded with the hearing without counsel).

Even if Plaintiff did not knowingly waive his right to counsel, he would not be entitled to relief unless he could show that he was prejudiced. Brown v. Shalala, 44 F.3d 931, 934 (11th Cir. 1995). The only prejudice that Plaintiff asserts is that his wife did not believe she would be allowed to have an attorney at her own hearing because Plaintiff did not have one at his hearing. This does not warrant a finding that Plaintiffs rights were violated and that a new hearing is required.

In a somewhat related argument, Plaintiff asserts that he did not receive a full and fair hearing. Although the ALJ always has a duty to

develop a full and fair record, when a claimant is unrepresented, the ALJ's duty is heightened so that the ALJ must "scrupulously and conscientiously probe into, inquire of, and explore all the relevant facts." Id. at 934-35 (citation omitted); Binion, 13 F.3d at 245 (holding that although plaintiff did not waive his right to representation, he was not prejudiced because ALJ fully and fairly developed the record). Plaintiff does not contend that the facts contained in the CDIU report on which the ALJ relied are false. Indeed, as noted above, Plaintiff pled guilty to a drug offense arising out of the investigation covered by the report. In a April 25, 2006, Memorandum to the Court, Plaintiff wrote, "I owned up to my 'error in judgment'.... I am paying debt to society and 'believe me,' I will never, ever do anything wrong again." Doc. #13, at 2. The Court concludes that Plaintiff received a full and fair hearing before the ALJ.

Was Plaintiff Engaged in SGA?

Next, Plaintiff argues that he was not engaged in SGA. The Court finds that there was substantial evidence for the ALJ to find that Plaintiff was engaged in SGA. The record indicates that Plaintiffs drug sale operation was substantial in that it required significant physical or mental activities. Plaintiff was self employed, and although his wife aided him, the record indicates that Plaintiff was managing the operation. Plaintiff met with clients,

made the deals, and handled the monetary transactions. He actively attempted to gain new business, as demonstrated when he told the undercover officer to bring her boyfriend over and said he had a steroids book that he would show him. Tr. at 205. Plaintiff also kept the supplies he needed to sell prescription drugs, including the drugs themselves, syringes, and plastic baggies.

The record also indicates that Plaintiffs activity was gainful because it was clear he was engaged in it for a profit motive, and did make a profit. Plaintiff was found to have $16,900 in cash in his home. Additionally, he was twice heard telling the undercover officer that he was happy the officer was buying drugs because he could "use the money." Tr. at 205, 208. Just with the purchases of the undercover officer, Plaintiff earned a total of $1000 in less than one month. Tr. at 210, 205, 208. And he stated that he had another Fed Ex package of drugs scheduled to arrive. Tr. at 208.

The Court, however, finds no substantial evidence in the record as a whole supporting the finding that Plaintiff was engaged in SGA as of his disability onset date of February 28, 1999, or within 12 months of that date. As noted above, the ALJ stated that "the evidence of the record is persuasive that the claimant's illegal activity has been of long term since receiving his disability benefits," and concluded that Plaintiff had not been unable to

perform substantial gainful activity from February 28, 1999, and thereafter, for any continuous period of 12 months. The ALJ does not indicate on what evidence he relies to support this conclusion. The Commissioner's brief in support of the answer posits that the ALJ's conclusion is supported by the confidential informant's statements that Plaintiff bragged that he received disability benefits although he was not disabled, and that Plaintiff had offered to teach her a credit card scam in return for $1500. These statements, even if taken as true, do not constitute substantial evidence of the duration of Plaintiff's SGA.

The Commissioner also points to the evidence in the record that Plaintiff worked out daily and was photographed dancing while performing with his band. The photographs in question were taken in June 2004, and the only evidence in the record as to when the band was formed is Plaintiff's statement that it was formed in September 2003. In any event, this evidence is not related to Plaintiff's engagement in SGA. The amount of drugs and money found in Plaintiff's apartment, as well as statements by the informant related to a time period before September 2004, certainly indicate that Plaintiff's drug selling operation began before September 2004. But the Court does not see evidence in the record to support the ALJ's conclusion that Plaintiff was engaged in SGA as far back as 12 months within his onset date.

The Court concludes that the case must be remanded for the Commissioner to determine when Plaintiff first engaged in SGA. The record may contain evidence that would support a decision that Plaintiff fraudulently misrepresented facts in connection with his December 1999 application for disability benefits, and that he was not disabled at that time. See Britton, 908 F.2d at 331 -32 (evidence that recipient of disability benefits intended to defraud government at time of applying for benefits by continuing SGA after benefits began could include conduct of recipient after year in which claim was made). The Court believes, however, that this decision must be made in the fust instance by the Commissioner and not the Court. Here the ALJ limited his decision to finding that Plaintiff was engaged in SGA.

CONCLUSION

IT IS HEREBY ORDERED that the decision of the Commissioner is **AFFIRMED** in part and **REVERSED** in part. The decision is affirmed with respect to the denial of benefits from August 2004. The decision is reversed with respect to the denial of benefits prior to that date, and **REMANDED** for further consideration consistent with this Memorandum and Order.

An appropriate Judgment shall accompany this Memorandum and Order.

/s/ AUDREY G. FLEISSIG

UNITED STATES MAGISTRATE JUDGE

Dated on this 16th day of January, 2007.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff(s),

vs. Case No. 4:05CR00110 ERW

STEPHEN MARINO,

Defendant(s).

ORDER TERMINATING SUPERVISED RELEASE

This matter comes before the Court on Pro Se Request for Termination of Supervised Release [doc. #61]. After consideration by this Court, Defendant's request is granted as set forth in this Order.

IT IS HEREBY ORDERED that the Defendant Stephen Marino was placed on supervised release on September 28, 2005, for a period of two years. Following review of the pro se Request for Termination of Supervised Released dated June 14, 2006, the Defendant moved to have his supervised release transferred to Italy where his wife of 22 years, Rosita M. Marino, was deported. Supervision of Defendant in Italy is not a possibility. There have

been no violations of supervised release since the Defendant's release. Because of Defendant's health, he is unemployable. Because Defendant is unemployable at the present time due to serious health conditions, this Court has few services to aid Defendant. Considering his strong desire to be reunited with his wife, and continued conditions of supervised release will make that impossible, it is hereby ordered that Defendant Stephen Marino be discharged from Supervised Release and that the proceedings in this case be terminated.

So Ordered this 22nd day of June , 2006.

/s/ E. RICHARD WEBBER

UNITED STATES DISTRICT JUDGE

REUBEN L. SCHNAYER, PH.D., C. PSYCH.
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PSYCHOLOGICAL CONSULTATION REPORT

2008-02-11

Name: Stephen Marino

D.O.B.: November 27, 1955

Address: 992 Hall Avenue

Windsor, Ontario

Phone: 519-915-1696

REASON FOR REFERRAL

At the request of Mr. Marino's counsel, this adult was referred for a psychological consultation. The purpose of this consultation was to evaluate Mr. Marino's current emotional functioning and provide an opinion regarding his "employability in the open labor market".

PROCEDURES

Accordingly, a clinical interview was conducted with Mr. Marino. In addition, Mr. Marino completed the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). All information provided by Ellen Morgan, Mr. Marino's counsel, was received and reviewed. A list of the materials would be available upon request.

The MMPI-2 is a 567 item personality inventory. The response format is true or false. The individual's personality profile is reflected on 10 dimensions on the Basic Scales as well as on additional Content and Supplementary Scales.

CAUTION: THIS REPORT HAS BEEN PREPARED FOR MR. MARINO AND COUNSEL. UNDER NO CIRCUMSTANCES SHOULD THE CONTENTS OF THIS REPORT BE DISCLOSED WITHOUT THE WRITTEN CONSENT OF MR. MARINO.

RELEVANT BACKGROUND INFORMATION

With respect to his family history, Mr. Marino reported that he has been married for 24 years. He has two children as a result of this marriage. He claimed that he does not maintain close relationships with either of his children. However, his youngest daughter has now come to Canada and is residing with him. Regarding his extended family, Mr. Marino's father is deceased (July of 1999) and he

has not spoken with his mother since his father's death. Mr. Marino has 3 siblings. He indicated that he does not maintain any close relationships with any of these siblings. However, it appears that he had a very strong and positive relationship with his father.

With respect to occupational history, Mr. Marino has his real estate license since March of 1985. He reported that over the years he has generally served in a property management position. Regarding his education, Mr. Marino completed a Bachelor of Arts Degree in Fine Arts and Communication in 1979.

With respect to previous psychiatric history, it was quite apparent that Mr. Marino has had a long involvement with mental health professionals. In addition, it was reported that he has been hospitalized on a number of occasions dating back to the early 1990s. Previous hospital and psychiatric reports are available to provide more in-depth information regarding Mr. Marino's psychiatric history. This information will not be presented in detail in this Report and the interested reader should refer to these Reports. In summary, based on a review of his file, it would appear that Mr. Marino has experienced difficulties with his volatile temper, insomnia, impulsive behavior, depression and anger management throughout the years. Consequently, he has been previously diagnosed with various

psychiatric / psychological disorders including: Intermittent Explosive Disorder, Avoidance Personality Disorder, Severe Depression, Bipolar Disorder, etc... Mr. Marino has been given various psychotropic medications throughout the years with some success noted.

FINDINGS / INTERPRETATIONS

Behavioral Observations

Mr. Marino presented as a friendly, cooperative, and talkative adult who could be described as somewhat "rough around the edges". His demeanor and responses to the tests administered as well to the questions asked throughout the interview were appropriate. In fact, it was readily apparent that Mr. Marino was quite open and willing to admit to his apparent shortcomings. Therefore, it can be concluded that the results obtained represent a valid and realistic appraisal of this individual's current emotional functioning.

Emotional Functioning

With respect to Mr. Marino's personality functioning, based on his responses to a personality inventory (MMPI-2), there were indications of significant psychopathology. His responses were consistent with individuals who responded frankly and openly to the items presented and were willing

to admit to minor faults. It should also be noted that his responses suggested serious psychological and emotional problems.

With respect to his moods, Mr. Marino's responses were consistent with individuals who are experiencing a moderate to severe level of emotional distress that is characterized by brooding, dysphoria (i.e., an unpleasant mood characterized by discontent, depression, anxiety and restlessness), anger, and anhedonia (i.e., the inability to derive pleasure from experiences that are normally pleasurable). Much of the time, these individuals tend to feel depressed and worry about something. These individuals also tend to be very fearful, easily frightened, and generally apprehensive and dread what might happen to them. These individuals feel angry with both themselves and others. They feel they are more sensitive and feel emotions more intensely than others and their feelings are easily hurt. Mr. Marino's responses suggested that he feels disappointments so keenly that he cannot put them out of his mind. These individuals tend to wish that they could be as happy as others seem to be. The future seems somewhat hopeless to him. Mr. Marino's responses suggested that he is unable to "get going" and get things done in his life.

With respect to cognitions, Mr. Marino finds it very hard to concentrate on a task or job and believes that his judgment is not as good now as it

was in the past. Mr. Marino's responses suggested that he is forgetful and has memory problems. These individuals tend to lack self-confidence and are sensitive to any form of criticism, assuming others are against them and anticipate being rejected. His responses were also consistent with individuals who think that they are "about to go to pieces". These individuals tend to be afraid that they are about to "lose their minds" and that there is something wrong with their minds. Mr. Marino's profile suggested that he is convinced that others are talking about him and plotting against him and that strangers are looking at him in a critical manner.

Regarding his interpersonal relations, Mr. Marino's responses were consistent with individuals who are very introverted and withdraw from and keep others at a distance. Their behaviors are likely to be unpredictable and inappropriate, which also make others uneasy around them. These individuals tend to be suspicious and distrustful of others. They avoid serious emotional relationships. They dislike having people around them and spend most of their spare time by themselves. These individuals feel lonely even when they are with people. Mr. Marino's withdrawal and isolation only serves to exacerbate his symptoms. Mr. Marino's responses suggested that he believes that no one seems to understand him. His family is critical of him and he feels alienated from them.

Occupational Incident

Mr. Marino reported that he was hired as a property manager for a management company operating low income housing units (1997). He claimed that he was fired from this position in 1998. Further, he was re-hired for this same position 4 months later as he alleged that they could not find anyone else to perform this function. During the winter of 1998/99, Mr. Marino alleged that he was sitting in his office when 3 maintenance men came running into the office and told the secretary to lock the door. It would appear that there was a "car load of gang bangers" in the complex and they had chased the security guard, had removed his gun and were beating him up in front of the office building. Mr. Marino proceeded to open the door, pull his gun and told these individuals to move away from the security guard. After this encounter, Mr. Marino reported that he went back into his office and was "shaking." Mr. Marino claimed that he scared himself as, given his very negative experiences in this neighborhood with this employment position, he felt that he could have killed those men. Since that time, Mr. Marino claimed that he was "pushed to the edge" and for the first time he was afraid that he could have actually killed someone. Further, Mr. Marino reported that his nervousness, anxiety and irritation have increased since that incident. In

addition, sleeping difficulties have also been exacerbated.

IMPRESSIONS AND RECOMMENDATIONS

Based on the information received from this adult and from a review of his prior history, it is quite apparent that Mr. Marino would be permanently disabled, from all employment in the open labor market, as a result of a combination of factors including: the incident at Greystone Partners and his significant pre-existing psychological conditions. Mr. Marino is an individual who would experience considerable difficulty working with and around people as well as "taking orders" from others.

Accordingly, with respect to diagnostic issues, based on the limited involvement with this individual and a review of the information provided by counsel, the following DSM-IV would be presented.

Axis I

Major Depression, Recurrent with Panic Episodes

Axis II

Mixed Bipolar Disorder
Intermittent Explosive Disorder

Axis III

Unspecified Anterior Pituitary
Hypogonadism
Adult growth hormone deficiency
Carpal Tunnel

Axis IV

Problems related to interaction with the legal system.
Problems with primary support group

Axis V

Global Assessment of Functioning (GAF) = 48

Please note that the information presented in Axis III was derived exclusively from the medical information provided in Mr. Marino's medical file.

Based on my involvement with this individual, it is this Consultant's opinion that Mr. Marino's experiences appear to be genuine and not feigned in any way.

/s/ Reuben L. Schnayer, Ph.D., C. Psych.

DEPARTMENT OF HEALTH AND HUMAN SERVICES DEPARTMENTAL APPEALS BOARD CIVIL REMEDIES DIVISION

Social Security Administration,
Office of Inspector General,
Petitioner,

September 11, 2006

v.

Docket No. C-06-480

Stephen Marino,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE INSPECTOR GENERAL'S DECISION TO IMPOSE CIVIL MONETARY PENALTY

Preliminary Statement

Respondent, Stephen Marino, submits this brief in opposition to the Inspector General's decision to impose a civil monetary penalty for allegedly making a false statement when filing an Application for Benefits with the Social Security Administration in February of 2005. Respondent did not violate any laws and has been totally disabled to work since February, 1999.

Issue

Whether or not a preponderance of the evidence supports the Inspector General's allegation that the Respondent knowingly made a material false statement to SSA when applying for benefits in February of 2005, and supports the Inspector General's decision to propose a civil monetary penalty against Respondent.

Statement of the Case

Respondent adopts the Petitioner's Statement of the Case with the following additions:

1. Although the Respondent was indicted in the Eastern District of Missouri on nine counts, Respondent pled guilty only to one count of Distribution of Schedule 3 Controlled Substance.
2. Although a penalty letter was sent to the Respondent on March 30, 2006 proposing a penalty amount of $10,000.00 and indicating an SSA overpayment of $123,776.00, the false statements alleged to have been made by Respondent in February 2005, have in no way contributed to the overpayment.

Statement of Facts

The Respondent, Stephen Marino, has been disabled and continues to be disabled since February

28, 1999. He was found to be disabled by SSA ALJ James K. Seitz in a decision dated August 29, 2000. The nature of Respondent's disability is psychiatric and mental.

In September 2004, the Respondent was investigated by the CDI Unit and the St. Louis County Police Department. It was alleged that Mr. Marino illegally sold prescription and non-prescription drugs on September 3, 2004, September 23, 2004 and October 4, 2004. On October 5, 2004 Mr. Marino's house was raided and items including cash in the amount of $16,900.00, a Smith & Wesson 38 caliber pistol, various drugs and paraphernalia, business cards and photographs were seized.

On January 28, 2005 ALJ Steitz reopened the prior hearing decision of August 29, 2000 and determined that the Respondent was not disabled and had never been disabled. This decision was made at a hearing where the Respondent was not afforded legal counsel, a full record was not developed and the ALJ cited no psychiatric or other professional opinion in making the determination that the Respondent was not under a disability.

The Respondent appealed the January 28, 2005 decision from ALJ Seitz. That case is currently under review in the United States District Court for the Eastern District of Missouri. However, in February of 2005 the Respondent filed a new

application for SSA benefits. In his application he indicated that he was still disabled. The Respondent never received another penny from the SSA following his February 2005 application for SSA benefits. The statements made in February 2005, for which the OIG proposes a civil monetary penalty of $10,000.00, the maximum amount has resulted in zero overpayment to the Respondent by the SSA.

Arguments

Stephen Marino, the Respondent, remains disabled and unable to work through this date. In June 2006, E. Richard Webber, United States District Judge for the Eastern District of Missouri, terminated the Respondent's supervised release from the criminal prosecution resulting from the SSA investigation. Judge Webber's Order states, "because of Defendant's health, he is unemployable. Because Defendant is unemployable at the present time due to serious health conditions, this Court has few services to aid Defendant." (R.Ex.1 p.1). Judge Webber has had the benefit of consulting with the United States Probation Office who performed a thorough background check on Mr. Marino including his ability to work, his mental condition and his financial condition. Also of note is that in the criminal case brought against Mr. Marino, there was no fine imposed against Mr. Marino. This was due to Mr. Marino's lack of ability to pay a fine.

Stephen Marino was seen by George H. Dowell, a psychiatrist in 2005 and 2006. Dr. Dowell states in June of 2005 "It is inconceivable that he can work - he is barely out of an institution". (R.Ex.3 p3 of 5). On February 6, 2006 Dr. Dowell indicates in a two page letter that "Steve's GAF is a chronic 50" "I would certainly see his as disabled". (R.Ex.2 p2 of 2). There's no indication in the record that Mr. Marino's condition worsened to such an extent in the nine month period between September of 2004 and June of 2005 which suddenly rendered him incapable of work. Obviously, Mr. Marino was disabled and has been disabled for quite some time. Mr. Marino has been seeing a psychiatrist regularly and monthly since at least February of 2001. (R.Ex.1 p1-38) Dr. Chiganti, who saw Mr. Marino on a monthly basis never indicated to Mr. Marino that he was able to return to work. Dr. Chiganti continually prescribed controlled substances in an attempt to aid Mr. Marino's mental condition. Mr. Marino had a good faith basis for making the statements to Social Security Administration in February 2005 that he was still disabled and unable to work. As a matter of fact, the only psychiatric or professional opinions available as evidence in this case indicate that Mr. Marino is permanently and totally disabled. (R. Ex.2 p.1, 2; R.Ex.3 p. 1-5).

The CDI report that was prepared and forwarded to Judge Steitz for his review was

misleading in several ways. First, it indicated that there was $16,900.00 cash seized from Mr. Marino's residence. The report seems to indicate that the cash was somehow monetary gain from illegal drug sales. However, in reality, the cash found at Mr. Marino's house came from a variety of sources including, but not limited to, the savings from earnings of the Respondent's daughter, Daniela Marino (R.Ex.5 pi-5); a personal injury settlement for Stephen Marino in the amount of $12,000.00 (R.Ex.6 p.1 & R.Ex.7p.l); four Workers Compensation settlements for Rosita Marino, the Petitioner's wife, (R.Ex.8 p.1, R.Ex.9 p.1, R.Ex.10 p.1, R.Ex. l1 p.1, R.Ex.12 p.1); RSDI back pay from the Social Security Administration for Stephen Marino in the approximate amount of $16,000.00 (RX13, Page 1, 2 & 3). In addition, the gun that was seized by the police when Mr. Marino's house was raided in October of 2004 had nothing to do with illegal drug sales in 2004. The gun was purchased by Mr. Marino in August of 1986. Mr. Marino had the proper permit to acquire a firearm. (R.Ex.14 p.1).

Much is also made of the fact that Mr. Marino played in a band. While it is true that Mr. Marino played several times in a band, again due to his mental and psychiatric conditions, this was not any sort of sustainable activity. Mr. Marino could not get along with others in the band and the group quickly disbanded.

The SSA has no evidence that Mr. Marino ever averaged more than $500.00 of monthly income for any period of time. As a matter of fact, in the year 2004, the year in which it was alleged that Mr. Marino had substantial, gainful activity, Mr. Marino's income tax shows gross earnings of less than $2,400.00 or an average of less than $200.00 per month. (R. Ex.17 p.1-6). This does not rise to the level of substantial gainful activity that is defined by the Social Security Administration.

Based on the foregoing, even if the OIG was justified to impose a civil penalty upon the Respondent, there are mitigating circumstances. First, it cannot be denied that the Respondent has been disabled since February of 1999 and continues to remain under a mental and psychological disability. That fact has been determined by Judge Webber as well as Dr. Dowell and is further indicated by the continuing psychiatric appointments with Dr. Chiganti. Second, Respondent's state of mind should be taken in to consideration. Considering that the Defendant's disability is psychiatric and mental, the Respondent should be given some latitude in this area. Remember, we are dealing with a Respondent who is not in his right mind. His disability is mental. Respondent had no idea that it would be alleged that he was making a false statement in applying for disability benefits in February of 2005. Additionally,

Respondent has appealed the decision of ALJ Steitz dated January 28, 2005 and did not agree with the same. Lastly, the Respondent's alleged false statements in February of 2005 have resulted in absolutely no payment of any kind to the Respondent. Stephen Marino has not received one cent from the Social Security Administration as a result of the alleged false statements made in February 2005. Under the circumstances, for the OIG to propose a civil monetary penalty in the maximum amount or $5,000.00 for each statement, is totally inappropriate. Also, there is really only one statement that the Respondent made, the Respondent stated that he is disabled and has been unable to work since February 1999 when his disability began.

Conclusion

The Respondent suffers from a mental and psychiatric disability which began in February of 1999 and continues through this date. The statements which the Respondent made to SSA in his application for benefits in February of 2005 were not false and are supported by the medical records and documentation. The statements made by the Respondent in February of 2005 in his application for SSA benefits have not resulted in one cent being paid to the Respondent by the SSA. No overpayment whatsoever exists as a result of any statements

made by the Respondent for which the OIG is proposing a civil monetary penalty. Wherefore, the Respondent requests that the determination of the OIG to impose a civil monetary penalty be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2006, a copy of Respondent's Brief in Opposition to the Inspector General's Decision to Impose Civil Monetary Penalty, Respondent's Exhibit List and Respondent's Witness List were served via U.S. Regular Mail, postage prepaid, upon:

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RESPONDENT'S EXHIBIT LIST

#1 Order of District Court Terminating Supervised Release, dated June 22, 2006

#2 Letter from George H. Dowell, M.D., dated February 6, 2006

#3 Office notes from Allied Behavioral Consultants, Inc. (Dr. Dowell), dated April 21, 2005 through August 2, 2005

#4 Office notes from Chiganti & Associates, P.C., dated February 3, 2001 Through November 6, 2004

#5 Payroll Records of Daniela Marino

#6 Settlement Check - Stephen Marino, dated February 11, 2002

#7 Settlement Check - Stephen Marino, dated March 6, 2002

#8 Settlement Check - Rosita Marino, dated November 6, 2002

#9 Settlement Check - Rosita Marino, dated November 6, 2002

#10 Settlement Check - Rosita Marino, dated January 7, 2003

#11 Settlement Check - Rosita Marino, dated January 7, 2003

#12 Settlement Check - Rosita Marino, dated November 20, 2002

#13 RSDI Payment Worksheet - Stephen Marino

#14 Gun Permit - Stephen Marino, dated August 28, 1986

#15 Durable Power of Attorney, dated August 10, 2006

#16 Declaration of Stephen Marino, dated September 7, 2006

#17 2004 Tax Return of Stephen Marino

RESPECTFULLY SUBMITTED,

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